U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0443 BLA
and 14-0443 BLA-A

CHARLES E. LEDENDECKER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	DATE ISSUED: 09/30/2015
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Macey Swanson and Allman), Indianapolis, Indiana, for claimant.

H. Brett Stonecipher and Joseph V. McReynolds (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denial of Claim (2013-BLA-06074) of Administrative Law Judge Daniel F. Solomon rendered, on a subsequent claim filed pursuant to provisions of the Black Lung Benefits Act, 30

U.S.C. §§901-944 (the Act).[1] The administrative law judge credited claimant with twenty years of underground coal mine employment, based on the stipulation of the parties, and considered entitlement under 20 C.F.R. Part 718. The administrative law judge determined, based on the newly submitted evidence, that claimant did not prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, thus, failed to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Therefore, the administrative law judge determined that claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant argues that the administrative law judge erred in discrediting Dr. Istanbouly's opinion on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv).[3] In its cross-appeal, employer asserts that the administrative law judge erred in finding that the opinions of Drs. Selby and Broudy were not adequately reasoned under 20 C.F.R.

[1] Claimant filed his initial claim for benefits on March 21, 2000, which was denied by the district director on May 31, 2000, because claimant did not establish that he had coal workers' pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis. Director's Exhibit 1 at 121, 166. Claimant filed a second claim for benefits on January 31, 2005, which was ultimately denied by Administrative Law Judge Edward Terhune Miller on April 29, 2008, as claimant did not show a change in any of the applicable conditions of entitlement at 20 C.F.R. §725.309. Director's Exhibit 2. On November 12, 2012, claimant filed his third claim, which is the subject of this appeal. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those of an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] At the end of claimant's brief, he also states that he "is entitled to black lung benefits for all of the reasons stated in [c]laimant's post-hearing brief, which is incorporated herein in full, and which is attached hereto as Exhibit A in support of black lung benefits . . . ." Claimant's Brief at 6. However, the attached brief does not raise any issues that are not raised in claimant's brief on appeal.

§718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, has not filed a response brief in either appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish any element of entitlement, claimant had to establish one element, based on the newly submitted evidence, in order to obtain review of the case on the merits. *Id*.; *see White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004).

A reasoned opinion diagnosing a totally disabling impairment is one in which the physician accurately reports the exertional requirements of the miner's usual coal mine employment, compares these requirements to the physical limitations caused by a respiratory or pulmonary impairment, and adequately explains his or her conclusion. 20 C.F.R. §718.204(b)(1); *see Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990); *Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-260 (7th Cir. 2005). If the physician does not explicitly indicate whether the miner is totally disabled, an administrative law judge may infer a diagnosis of a total respiratory or pulmonary disability by comparing the exertional requirements of the miner's usual coal mine work with medical opinions identifying the physical limitations attributable to the miner's respiratory or pulmonary impairment. *See Poole*, 897 F.2d at 894, 13 BLR at 2-356.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has twenty years of underground coal mine employment. Decision and Order at 4; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects that claimant's coal mine employment was in Illinois. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In this case, the administrative law judge relied on claimant's deposition and hearing testimony to find that his usual coal mine job as a repairman required "heavy manual labor."[6] Decision and Order at 10. Upon considering the medical opinion of Dr. Istanbouly, the only physician to diagnose a totally disabling respiratory impairment, the administrative law judge found that it was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[7] Decision and Order at 11; Director's Exhibits 12, 13. The administrative law judge determined that Dr. Istanbouly's opinion was not adequately reasoned because he did not have an accurate understanding of the exertional requirements of claimant's usual coal mine work, and did not rely on a comparison of these requirements to claimant's physical limitations. Decision and Order at 11; Director's Exhibits 12, 13; Claimant's Exhibit 3. Claimant argues that, contrary to the administrative law judge's finding, Dr. Istanbouly knew the exertional requirements of claimant's previous coal mine employment, and rendered a well-reasoned diagnosis of a totally disabling respiratory impairment.

After reviewing the administrative law judge's Decision and Order, and claimant's allegations of error on appeal, we affirm the administrative law judge's discrediting of Dr. Istanbouly's opinion because he provided a basis for his finding that is rational and supported by substantial evidence. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007). The administrative law judge accurately noted that Dr. Istanbouly stated at his deposition that, "when I see irreversible lung damage which is moderate in intensity and there is a good possibility it is related to coal dust inhalation, definitely this patient cannot go back to work in the coal mine, *regardless of the job*

[6] At claimant's deposition on May 10, 2013, he testified that, while working for employer, he "ran a buggy," ran "a scoot," "operated a roof bolter," and ran "a miner when somebody was absent." Director's Exhibit 27 at 6. Claimant stated that he last worked for employer as a repairman, which required him to splice cables, change hydraulic hoses, rewire parts of the electrical system and overhaul continuous miners. *Id.* at 8, 10. At the hearing on June 5, 2014, claimant stated that he had to lift about one hundred pounds when doing repairs and carried tools weighing from twenty to twenty-five pounds on his belt. Hearing Transcript at 12. Claimant also indicated that he walked about seven hours a day. *Id*. at 13.

[7] Dr. Istanbouly examined claimant on December 11, 2012, and diagnosed chronic obstructive pulmonary disease and coal workers' pneumoconiosis. Director's Exhibit 12. Dr. Istanbouly also reported that claimant has a moderate obstructive impairment, based on the pulmonary function studies, and the decline in claimant's pO2 during an exercise blood gas study. *Id*. Dr. Istanbouly indicated that it was his opinion that claimant's moderate impairment prevented him from performing his usual coal mine employment. Director's Exhibit 13; Claimant's Exhibit 3 at 10, 15.

description, as long as there is coal dust exposure." Decision and Order at 11, *quoting* Claimant's Exhibit 3 at 15 (emphasis added). Based on this statement, the administrative law judge reasonably determined that Dr. Istanbouly essentially opined that claimant is totally disabled because he must avoid further exposure to coal dust.[8] *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); Decision and Order at 11. He permissibly found, therefore, that Dr. Istanbouly did not offer a reasoned diagnosis of total disability under 20 C.F.R. §718.204(b)(2)(iv), because a prohibition on further dust exposure is not a diagnosis of a totally disabling respiratory or pulmonary impairment.[9] *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296, 13 BLR 2-418, 2-425 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

[8] Claimant maintains that this statement represents Dr. Istanbouly's opinion that claimant's impairment is so severe, he is unable to perform any job in the mine, regardless of its exertional requirements. Claimant's Brief at 5. We reject claimant's argument. An administrative law judge is granted broad discretion in his role as fact-finder to evaluate the medical opinion evidence and draw inferences therefrom. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-22 (1988). As indicated *supra*, the administrative law judge's finding, that Dr. Istanbouly based his disability determination on claimant's need to avoid additional coal dust exposure, was a reasonable inference to draw from Dr. Istanbouly's remark. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); Decision and Order at 11.

[9] Although the administrative law judge did not explicitly address Dr. Istanbouly's observation, that claimant cannot do his usual coal mine work "[i]n a coal mine where it is damp, cold and where his activity level required standing, walking, stooping and shoveling for 8-12 hours," it is encompassed by the administrative law judge's permissible finding that a physician cannot base a total disability diagnosis on environmental conditions in the mine. Director's Exhibit 13; *see Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296, 13 BLR 2-418, 2-425 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990). In addition, Dr. Istanbouly noted at his deposition that, "if I see [an] abnormal pulmonary function test, though it is close to disability level, a little bit higher than disability level, and I see [an] abnormal exercise test, though it did not meet the disability level, in addition to the x-ray abnormality, this patient is disabled." Claimant's Exhibit 3 at 10. Although the administrative law judge did not consider this particular statement either, his rational finding, that Dr. Istanbouly did not rely on a comparison of the exertional requirements of claimant's work to his physical limitations, also applies to the physician's comment on the significance of claimant's objective studies and x-ray. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988).

We affirm, therefore, the administrative law judge's finding that Dr. Istanbouly's opinion is "inadequately reasoned," and insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), as Dr. Istanbouly "did not compare the exertional requirements of [c]laimant's usual coal mine employment against his physical limitations."[10] Decision and Order at 11; *see Killman*, 415 F.3d at 721, 23 BLR at 2-258-59. Additionally, the administrative law judge rationally did not infer disability based on a comparison of Dr. Istanbouly's testimony regarding claimant's limitations with his own findings regarding the exertional requirements of claimant's employment. See *Poole*, 897 F.2d at 894, 13 BLR at 2-356 (7th Cir. 1990). Consequently, we also affirm the administrative law judge's finding that the newly submitted evidence, when considered as a whole, was insufficient to prove that claimant suffers from a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). Finally, we affirm the administrative law judge's determination that claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and further affirm the denial of benefits.[11]

[10] Because we affirm the administrative law judge's discrediting of Dr. Istanbouly's opinion on this ground, we need not address claimant's arguments concerning whether Dr. Istanbouly had an accurate understanding of claimant's usual coal mine employment. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

[11] In light of our affirmance of the administrative law judge's finding, that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we decline to address employer's cross-appeal challenging the discrediting of the opinions of Drs. Broudy and Selby, that claimant does not suffer from total respiratory or pulmonary disability. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Accordingly, the administrative law judge's Decision and Order Denial of Claim is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge